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No. 03-1107

Supreme Court, U.S.
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In The
Supreme Court of the United States

CENTER FOR FAIR PUBLIC POLICY, et al.,

Petitioners,

vs.

MARICOPA COUNTY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The petitioners' statement of issues is misleading because it is premised on an inaccurate assessment of the Ninth Circuit's Opinion. The real issue is whether the Ninth Circuit was correct in agreeing with the unanimous Opinions from other Circuits that limited hours-of-operation restrictions on sexually-oriented businesses are constitutional under this Court's "secondary effects" doctrine in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

PARTIES TO THE NINTH CIRCUIT APPEAL

The Ninth Circuit appeal was actually two consolidated appeals. The petitioners in this Court were plaintiffs/appellants in one of them (No. 00-16858). They are an Arizona non-profit corporation named Center for Fair Public Policy and an Arizona limited-liability company named Liberty Entertainment Group (dba Dream Palace).

There were seven plaintiffs/appellants in the other consolidated appeal (No. 00-16905). Five of them were Arizona corporations named Castle Superstore, L.J. Concepts, Stummer, L.L.C., Mid-City Enterprises and B.C. Books. The other two were individuals named Daniel R. Golladay and Michael J. Ahearn. None of these seven plaintiffs/appellants is seeking certiorari, and none of them is participating in the Supreme Court proceedings.

There were five defendants/appellees in the two consolidated appeals. They were all Arizona governmental entities: the State of Arizona, the City of Phoenix, the City of Glendale, Maricopa County and Richard M. Romley, in his capacity as Maricopa County Attorney. All of the defendants/appellees except the State of Arizona join in this Brief in Opposition. They do not know whether the State of Arizona will be filing a separate Brief in Opposition.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents Maricopa County, the City of Phoenix, the City of Glendale and Richard M. Romley oppose petitioners' request for a Writ of Certiorari to review the July 28, 2003, Opinion of the Ninth Circuit. The Opinion is correct, well-reasoned and entirely consistent with this Court's precedents and every other Circuit that has decided the same issue. The petition has no merit and should be denied.

DECISIONS BELOW

A.R.S. § 13-1422 regulates the hours-of-operation for sexually-oriented businesses in Arizona. Plaintiffs in both of the consolidated cases challenged the constitutionality of that statute under the First Amendment.

The United States District Court for the District of Arizona denied plaintiffs' request for a preliminary injunction in an Order filed on September 30, 1999. (Record 57; Petitioners' App. 52) Plaintiffs appealed that Order to the Ninth Circuit, and the Ninth Circuit affirmed in a Memorandum Decision submitted on March 20, 2000. (Record 78; Petitioners' App. 50)

The parties then stipulated that the District Court's denial of the preliminary injunction could be treated as a denial of plaintiffs' request for a permanent injunction and a denial of plaintiffs' request for declaratory relief. (Record 83; Petitioners' App. 46) The District Court accepted that stipulation and entered Final Judgment in favor of the

governmental entities on September 13, 2000. (Record 84-85; Petitioners' App. 42-43)

Plaintiffs appealed again to the Ninth Circuit. That Court affirmed and upheld the constitutionality of A.R.S. § 13-1422 in a published Opinion issued on July 28, 2003. The cite for the Opinion is *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003). (Petitioners' App. 1)

JURISDICTION

This Court has jurisdiction to consider the petition under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

A.R.S. § 13-1422 provides in relevant part as follows:

> A. An adult arcade, adult bookstore or video store, adult cabaret, adult motion picture theatre, adult theatre, escort agency or nude model studio shall not remain open at any time between the hours of 1:00 a.m. and 8:00 a.m. on Monday through Saturday and between the hours of 1:00 a.m. and 12:00 noon on Sunday.
>
> B. A violation of this section is a class one misdemeanor.

Petitioners allege this Arizona statute violates the free-speech provision in the First Amendment to the United States Constitution:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . ."

STATEMENT OF THE CASE

A.R.S. § 13-1422 was presented to 1998 Arizona Legislature as Senate Bill 1367 (later changed to Senate Bill 1162). The statute does not ban any type of sexually-oriented business or conduct. It only restricts sexually-oriented businesses from operating during late night hours.

The purpose of the statute was to combat the negative secondary effects that are generated by sexually-oriented businesses. These effects include decreased property values and increased crime, prostitution, public indecency and health risks associated with sexually-transmitted diseases.

The Arizona Legislature held public hearings in both the Senate and the House of Representatives. Numerous witnesses confirmed the negative secondary effects and their impact on Arizona communities. Some of the witnesses were local business people, and one was the co-founder of a neighborhood activist group. A legislative liaison for the City of Phoenix testified that state-level regulation was necessary due to limited local authority.

The Executive Director and General Counsel to the National Family Legal Foundation testified that similar hours-of-operation statutes had been upheld as constitutional by Circuit Courts of Appeal. He also testified that approximately 15 studies from around the country had documented the negative secondary effects generated by sexually-oriented businesses.

This same witness gave legislators a written memorandum and an e-mail discussing A.R.S. § 13-1422. Those documents discussed the studies that confirmed negative secondary effects, and they also repeated the constitutional findings of both the Third and Sixth Circuits. *See*, *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435 (6th Cir. 1998); *Mitchell v. Commission on Adult Entertainment*, 10 F.3d 123 (3rd Cir. 1993).

Every legislator also received a letter and "fact sheet" from a community organization known as The Center for Arizona Policy. Those documents discussed A.R.S. § 13-1422 and detailed the findings of the various studies on negative secondary effects. The fact sheet emphasized that those effects could be reduced by limiting hours of operation for sexually-oriented businesses, and it amplified that that was the purpose of A.R.S. § 13-1422.

Petitioners and the other plaintiffs are owners and operators of sexually-oriented businesses in Arizona. They include nude-dancer clubs, X-rated video arcades and sellers of sexually-related magazines and paraphernalia. Most of the businesses were open 24-hours a day prior to the enactment of A.R.S. § 13-1422.

The hours-of-operation statute became effective on August 21, 1998. Petitioners and the other plaintiffs filed these consolidated lawsuits about a week later. Respondents were named as defendants because they are governmental entities charged with enforcement of the statute. Petitioners sought preliminary and permanent injunctions, and they also sought a declaration that A.R.S. § 13-1422 violates the First Amendment.

The District Court recognized that these cases were controlled by *Renton v. Playtime Theatres, Inc.*, 475 U.S.

41 (1986). *Renton* was the case where this Court established the now-familiar three-part test for evaluating the constitutionality of sexually-oriented business regulations:

- Does the regulation ban speech, or does it merely regulate the time, place or manner of speech?
- Is the purpose of the regulation to suppress sexual speech, or is the purpose instead to combat negative secondary effects that are generated by sexually-oriented businesses?
- Is the regulation designed to serve a substantial government interest, and does it leave open reasonable alternative avenues of communication?

475 U.S. at 46-50.

Renton also explained that governments are entitled to rely on evidence of the experiences and studies conducted by other jurisdictions, as well as the findings and statements contained in judicial Opinions. Time, place and manner regulations should be upheld "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." 475 U.S. at 51-52.

The District Court decided that A.R.S. § 13-1422 is constitutional under *Renton*. The Arizona statute obviously is a time regulation, and it makes no attempt to ban any sexual speech. The District Court explained that the Legislature's purpose was "to ameliorate the harmful secondary effects commonly associated with adult businesses." (Record 57 at 7; Petitioners' App. 57)

The District Court then said the record showed ample evidence, both oral and written, to support the legislative purpose. The District Court explained that while the legislative record was not extensive, it did contain testimony, fact sheets and letters regarding studies and cases from other jurisdictions that sufficiently illustrated a logical relationship between the hours-of-operation statute and the intent to combat the negative secondary effects of sexually-oriented businesses. (Record 57 at 8-10; Petitioners' App. 58-59)

The District Court next pointed out that *Renton* had already settled that combating secondary effects is a significant government interest. It said the statute was narrowly tailored under *Renton* because it would combat secondary effects more effectively than no statute at all, but still was not "substantially broader than necessary." See, *Ward v. Rock Against Racism*, 491 U.S 781 (1989). (Record 57 at 12-13; Petitioners' App. 60-61)

The District Court concluded its *Renton* analysis by emphasizing that petitioners and the other plaintiffs had ample alternative avenues of communication. Their businesses may remain open 17 hours a day Monday through Saturday, and 13 hours on Sunday. This totals more than 5900 hours per year that sexually-oriented businesses may be open in Arizona. (Record 57 at 13-14; Petitioners' App. 61-62)

While the consolidated cases were pending in the Ninth Circuit, this Court rendered its Opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). That case involved a Los Angeles zoning ordinance that prohibits more than one type of sexually-oriented business from operating in the same building. Two businesses that

combined video arcades and retail sales challenged the ordinance on First Amendment grounds.

The issue in *Alameda Books* was whether Los Angeles could constitutionally rely on only one distinguishable study regarding negative secondary effects. The Ninth Circuit said the study was inadequate to show a "substantial government interest" under *Renton*, but this Court reversed in a 5-4 decision. Justice O'Connor wrote the plurality Opinion, with Justices Scalia, Thomas and the Chief Justice joining. Justice Kennedy concurred separately.

The plurality reaffirmed *Renton* and the idea that regulations aimed at negative secondary effects will be upheld if their legislative purpose is to serve a substantial government interest. It also criticized the Ninth Circuit for conducting an independent assessment of the secondary-effects study that Los Angeles had relied on. The plurality said the Ninth Circuit was wrong to substitute its assessment of the study for that of the city, but it also cautioned:

> That is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual finding, the municipality meets the standard set forth in *Renton*.

535 U.S. at 438-439.

Justice Kennedy agreed with the plurality about *Renton*. He said "the central holding of *Renton* is sound,"

and the government's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. 535 U.S. at 444 and 448.

Justice Kennedy nevertheless did not want to expand *Renton* any further. He said that suppression of secondary effects may be accomplished by reference to protected speech, but "a city may not assert that it will reduce secondary effects by reducing speech in the same proportion." The plurality found this statement "unobjectionable" because it was:

> . . . simply a reformulation of the requirement that an ordinance warrants intermediate scrutiny only if it is a time, place, and manner regulation and not a ban.

The plurality then emphasized that the Ninth Circuit had already determined that the Los Angeles ordinance did not ban any speech. 535 U.S. at 442 and 449.

Petitioners here told the Ninth Circuit that *Alameda Books* constitutes a "sea change" in First Amendment law. They suggested the *Renton* framework no longer applies to time, place and manner cases, and that Courts must apply strict scrutiny whenever they measure the constitutionality of sexually-oriented-business regulations.

The Ninth Circuit disagreed. The majority pointed out that five Justices in *Alameda Books* (including Justice Kennedy) had reaffirmed *Renton*. The majority also said that Justice Kennedy's statement about proportionality does not apply here because A.R.S. § 13-1422 does not suppress any speech. It only limits the hours of operation for sexually-oriented businesses. 336 F.3d at 1162-1164.

The Ninth Circuit then performed essentially the same *Renton* analysis as the District Court. The majority explained the critical issue was whether respondents met their burden of demonstrating a connection between the hours regulation and the secondary effects that motivated adoption of the statute. In holding that respondents did meet that burden, the majority recognized:

> All of the evidence the Arizona legislature considered fairly supports its rationale that prohibiting sexually oriented businesses from operating in the late night hours will lead to a reduction in secondary effects, and generally enhance the quality of life for Arizona citizens.

336 F.3d at 1167.

The majority also decided that the statue is narrowly tailored. It said that amelioration of secondary effects would be achieved less effectively in absence of the statute, and:

> Testimonial evidence was introduced specific to the late night operation of such businesses, and the legislature was briefed on two studies specific to problems associated with nighttime operation of sexually oriented businesses.

336 F.3d at 1169. The Ninth Circuit therefore affirmed the Final Judgment of the District Court.

REASONS FOR DENYING THE WRIT

1. The Ninth Circuit's Opinion Is In Agreement With The Other Circuits In Upholding The Constitutionality Of Hours-Of-Operation Regulations For Sexually-Oriented Businesses.

Unlike the "hugely unique" zoning ordinance in *Alameda Books*, the statute involved here is a routine hours-of-operation regulation. Many (if not most) jurisdictions have identical or even more stringent hours restrictions.

No other Circuit has ever struck down an hours-of-operation restriction for sexually-oriented businesses. The same First Amendment issues raised here were previously decided by the First, Third, Fifth, Sixth, Seventh and Eleventh Circuits. Every one of those jurisdictions upheld the constitutionality of hours-of-operation statutes for sexually-oriented businesses. *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1998); *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435 (6th Cir. 1998); *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731 (1st Cir. 1995); *Mitchell v. Commission on Adult Entertainment*, 10 F.3d 123 (3rd Cir. 1993); *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074 (5th Cir. 1986).

2. The Ninth Circuit's Opinion Does Not Conflict With Justice Kennedy's Statement About Proportionality.

Justice Kennedy said the government may not assert that it will reduce secondary effects by "reducing speech in the same proportion." Petitioners claim this created a

heightened proportionality requirement for all sexually-oriented-business cases, and the Ninth Circuit erred in concluding that Justice Kennedy did not intend "proportionality" to invalidate every time, place and manner regulation. Petitioners are wrong.

As the Ninth Circuit explained, there is a major difference between the zoning ordinance in *Alameda Books* and the hours-of-operation restriction here. The Los Angeles zoning ordinance prohibits more than one type of sexually-oriented business from operating in the same building. One of plaintiffs' main arguments in *Alameda Books* was that this "hugely unique" ordinance effectively banned video arcades because they are not financially viable as stand-alone operations.

Justice Kennedy was addressing this "effective banning" argument when he said governments cannot reduce secondary effects by simply eliminating some speech. The plurality understood this and said Justice Kennedy's idea was "unobjectionable" because proportionality only becomes an issue when there is a ban or elimination of some protected speech.

Nothing is banned (effectively or otherwise) by A.R.S. § 13-1422. The Arizona Legislature did not try to "zone" anyone out of business. The statute is a routine hours regulation, and petitioners and the other plaintiffs are still free to open their businesses for 5900 hours every year.

Under these circumstances, *Renton* remains controlling. Justice Kennedy agreed with the plurality that *Renton* is sound. He also agreed that the government must have latitude to experiment with solutions, and that "very little evidence is required" to justify a secondary-effects statute. 535 U.S. at 451.

The undisputed evidence here proved that A.R.S. § 13-1422 was aimed at secondary effects, not sexual speech. That is precisely what *Renton* and *Alameda Books* require, so there is no reason for this Court to get involved.

3. There Is No Conflict Among The Circuit Courts Regarding The Application of *Alameda Books*.

Petitioners next claim certiorari is warranted because there is "a significant conflict" in the Circuit Courts of Appeals regarding Justice Kennedy's statement about proportionality. This argument is groundless.

Petitioners cite three recent Opinions in support of their theory. *See, N.W. Enterprises, Inc. v. City of Houston*, 352 F.2d 162 (5th Cir. 2003); *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631 (7th Cir. 2003); and *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003). None of those cases expressed any difficulty in applying *Alameda Books*, and none of the Circuit Courts even mentioned the so-called "conflict" that petitioners claim to exist.

The three cases also are very different from this case and each other. *N.W. Enterprises* involved license and zoning amendments to a comprehensive regulatory scheme. *G.M. Enterprises* involved performance limitations on nude dancing. *Encore Videos* involved a separation ordinance that prohibits sexually-oriented businesses from locating within 1000 feet of residential areas.

Nevertheless, the Seventh Circuit and both panels of the Fifth Circuit had no difficulty recognizing that *Renton* still applies to time, place and manner regulations. They

all discussed *Alameda Books*, and none of them accepted petitioners' contention in this case that *Renton* is no longer good law. As the Seventh Circuit explained in *G.M. Enterprises*:

> Justice Kennedy agreed [in *Alameda Books*] that the *Renton* test provided the appropriate level of scrutiny for a regulation that is "targeted not at the activity, but at its side effects." *Alameda Books*, 535 U.S., at 447.

350 F.3d at 637.

The Ninth Circuit understood the same thing here. There is no conflict among the Circuits, and this Court should ignore petitioners' attempt to create one.

4. The Ninth Circuit Applied The Correct "Narrow Tailoring" Test.

Petitioners' final argument for certiorari is that the Ninth Circuit stopped short in applying the "narrow tailoring" requirement of *Renton*. For this argument, petitioners accept that curbing secondary effects is a substantial government interest. They also accept that this Court stated the test for narrow tailoring in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989):

> Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests, but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that

> would be achieved less effectively absent the regulation."

491 U.S. at 798-799.

The Ninth Circuit cited *Ward* and expressly applied that test here. 336 F.3d at 1169. Petitioners claim that was not enough because the majority failed to address *Ward's* caveat that the regulation still cannot "burden substantially more speech than is necessary to further the government's legitimate interests." 491 U.S. at 799.

Petitioners are wrong for three reasons. One is because *Renton* expressly held that narrow tailoring is satisfied if the regulation applies only to the category of businesses associated with the secondary effects. 475 U.S. at 52. That is true here, and this Court has previously emphasized the targeted secondary effects are "almost unique" to sexually-explicit businesses. *Boos v. Barry*, 485 U.S. 312 (1988).

Petitioners also are wrong because the Ninth Circuit considered tailoring in the context of alternative avenues of communication. The majority highlighted that petitioners' businesses could remain open 17 hours a day Monday through Saturday, and 13 hours on Sunday. The Ninth Circuit was mindful of a fair means-end fit, and it reasonably agreed with the District Court that leaving 5900 hours of open time each year does not "burden substantially more speech than is necessary" under *Ward*.

Finally, narrow tailoring is a deferential standard. Courts should not second-guess legislative bodies, and where the record validates the Legislature's judgment, Courts should refrain from "replacing [legislative] factual predictions with our own." *Turner Broadcasting System,*

Inc. v. F.C.C., 512 U.S. 622 (1994). *See also, Young v. American Mini Theatres, Inc.*, 475 U.S. 50 (1976) (legislatures "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.")

The Ninth Circuit has not suddenly become lenient on government regulations for sexually-oriented businesses. The Ninth Circuit simply followed this Court's precedents, and there is nothing in the Opinion to indicate that the majority:

> .... established a new and startling speech-insensitive test for "narrow tailoring" which eliminates all suggestion that such restrictions must be "narrow," "tailored," or in any way "efficacious."

Petition at 19. This Court should not be fooled by petitioners' hysterics.

CONCLUSION

A.R.S. § 13-1422 is a modest hours-of-operation regulation, narrowly tailored and specifically intended to reduce the negative secondary effects that are generated by sexually-oriented businesses. The Ninth Circuit's Opinion is consistent with every other Circuit that has addressed the same issue. It also is consistent with *Renton* and *Alameda Books*. The petition is groundless, and there is no reason for the Court to grant certiorari. Respondents therefore ask the Court to deny the petition in its entirety.

Respectfully submitted this 3rd day of March, 2004.

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